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Euf 3/2/23

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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BK-N- 20-50660-GS
CHAPTER 7

IN RE

Adv. No. 21-05066-GS

METAL RECOVERY SOLUTIONS,
INC., aka MRS, INC.,

Hearing Date: MST Pending
and Time: _____
Mtn No. _____

Debtor(s).

MOTION TO MODIFY DECEMBER 21, 2020
PROTECTIVE ORDER

CHRISTOPHER P. BURKE, in his
capacity as Chapter 7 Trustee of METAL
RECOVERY SOLUTIONS, INC.,

Plaintiff,

vs.

METAL RECOVERY SOLUTIONS,
INC., aka MRS, Inc., THOMAS SEAL,
JETTE SEAL, DIFFERENTIAL
ENGINEERING, Inc, a Nevada
corporation and MARK SHONNARD,

Defendants.

Chapter 7 Trustee, Christopher P. Burke, files the following Motion to Modify this
Court's December 21, 2020 Protective Order in order to unseal a Technology License
Agreement.

1. Background

On November 9, 2020, Geo-Logic Associates, Inc. ("GLA") and Jex Technologies,
Inc. ("JEX") filed a stipulation seeking a protective order to facilitate the exchange of

1 information and documents that may be subject to confidentiality limitations on disclosure due to
2 federal laws, state laws, and privacy rights (Main ECF. 66). On December 21, 2020 this Court
3 entered a protective order (Main ECF 81).

4 Paragraph 10. of this Order states:

5 10. Any Party to the Proceeding (or other person subject to the terms of this
6 Protective Order) may ask the Court, after appropriate notice to the other
7 Parties to the Proceeding, to modify or grant relief from any provision of
this Protective Order.

8 On February 2, 2023 this Court held a status hearing in the adversary case (Adv. ECF
9 67). At that time, the Court set March 24, 2023 as the hearing date on the Trustee's Motion to
10 Approve Sale of Claims and Other Bankruptcy Estate Assets. In order to meet the 28 day notice
11 requirement under the Bankruptcy Rules, the last day the Motion could be filed was Friday,
12 February 24, 2023. GLA and the Trustee had agreed as to the final form and content of the
13 Motion on February 23, 2023.

14 On February 23, 2023 the Trustee filed a Motion to Approve Sale of Claims and Other
15 Bankruptcy estate Assets (Adv. ECF 68); Main ECF 255). The Trustee's counsel inadvertently
16 filed Exhibit 1, which was a Technology License Agreement between Differential Engineering
17 and JEX. This document had been sealed.

18 As a result, on February 28, 2023 the Trustee's counsel filed a motion to redact the
19 motions in the main and adversary cases. See (Adv. ECF 75 and Main ECF 262). The motions
20 were redacted on March 1, 2023. See Adv. ECF 76 and Main ECF 270. Trustee's counsel also
21 agreed with JEX's counsel to send a letter to all parties who received the February 23, 2023
22 motion to destroy the License Agreement.

23 **2. Relief Sought**

24 Given the inadvertent filing of the License Agreement on February 23, 2023, the proper
25 and immediate course of action was to file a motion to redact it. However, in its March 31, 2022
26 Memorandum Decision on Omnibus Objection to Claims 2 and 3, this Court specifically found
27 that Differential holds the patents to the Hydro-Jex technology. Differential has licensed the
28

Hydro-Jex patents to MRS. Beginning in 2019, Differential also licensed the patents to Jex Technologies, Inc (ECF 202, page 1, Lines 25-28).

Since the Debtor's rights to the patent license are part of the assets being sold, the Trustee has a fiduciary duty to disclose the License Agreement between Differential Engineering and JEX. This way any potential bidder will know the contents of the License Agreement

The Trustee is therefore seeking an order to unseal the License Agreement, and that he be allowed to mail a copy of it to the matrix with the order entered by this Court if the motion is granted.

3. Authority

A. THIS COURT'S MARCH 31, 2022 FINDINGS

The Differential/JEX Technology License Agreement is dated July 23, 2019. This Court made a specific finding that "The September 2019 minutes (for MRS) reflect that MRS retained authorization to use the Hydro-Jex technology in the Turkey area with the Labris mine project. . . . The patent licensing deal with Jex was also included in the minutes, having been signed in July 2019." (ECF 202 page 5, Lines 19-25).

This Court also stated in its opinion that "The amount of each monthly charge appears to be based upon the market price of eleven ounces of gold, which varies month to month. That same monthly price is reflected in the Jex patent license agreement with Differential." (ECF 202 page 6, Lines 1-8).

Finally, the Court concluded:

In sum, the patent license agreement as memorialized in the MRS board meeting minutes lacks valid consideration and is unenforceable as Differential was under a pre-existing duty to allow MRS to use the Hydro-Jex technology.

(ECF 202 page 23, Lines 13-18).

B. SEALED RECORDS AND THE TRUSTEE'S FIDUCIARY DUTY

This is a motion to Approve Sale of Claims and Other Bankruptcy Estate Assets. the Purchased Assets being sold include one claim adverse to the buyer, Geo-Logic: The pending appeal, *Geo-Logic Associates, Inc. v. Metal Recovery Solutions, Inc.*, No. 20-15157 (9th Cir.).

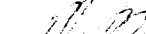
1 For this reason, the Court must apply both the §363 sale analysis and the factors required for
2 approval of a compromise under Fed. R. Bank. Proc. 9019. *Spark Factor Design, Inc. v.*
3 *Hjelmeset (In re Open Medicine Inst., Inc.)*, 639 B.R. 169, 182 (B.A.P. 9th Cir. 2022).

4 This is not the first time sealed records have clashed with the Trustee's fiduciary duties
5 under §363(b) and Fed. R. Bank. P. 9019. *In re Apply 2 Save, Inc.*, BKR. 09-20607-TLM,
6 2011 WL 1363771 (Bankr. D. Idaho Apr. 11, 2011) is worth noting. There, Judge Myers said
7 "[T]he idea of sealing the record utilized by a trustee to support the proper exercise of his
8 discretion in settling causes of action of the estate is incompatible with the authorities governing
9 approval of settlements discussed below. In material part, a trustee—as fiduciary to creditors—
10 is required to explain why he proposes a compromise and the reasons he chooses to exercise his
11 discretion in a particular way. One of the factors to be considered, as identified *infra*, is a
12 'proper deference' to the views of creditors of the estate as to the suggested settlement. One
13 must wonder how creditors can even form those views in the absence of information due to a
14 'sealed' factual record." *Id* at *2.

15 The Judge continued: "And not only is sealing inconsistent with the sort of disclosure
16 required under Rules 9019 and 2002 when compromises in bankruptcy are proposed, it is
17 inconsistent with the general proposition that the judicial records and processes of the federal
18 courts are open and public." *Id* at *2

19 Other Courts are in accord. See *In re Purdue Pharma L.P.*, 632 B.R. 34, (Bankr.
20 S.D.N.Y. 2021) noting that 11 U.S.C. §107(b)(1) recognizes a commercial information
21 exception. Commercial information is defined as information that would cause an unfair
22 advantage to competitors by providing them information as to the commercial operations of the
23 debtor. The Court added commercial information has been held to include information that if
24 publicly disclosed would adversely affect the conduct of the bankruptcy case. But it is not a safe
25 harbor for those who crave privacy or secrecy for its own sake. *Id* 39-40. See also *In re Rapid-*
26 *Am. Corp.*, 13-10687, 2017 WL 6459348, at *1 (Bankr. S.D.N.Y. Dec. 15, 2017), setting
27 forth the same definitions.
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For the reasons stated, the Trustee respectfully requests that this Court enter an Order granting his Motion to Modify the December 21, 2020 Protective Order in order to unseal the Technology License Agreement between Differential Engineering and JEX.

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